CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2978
Heard in Montreal, Tuesday, 13 October 1998
concerning
VIA RAIL CANADA INC.
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
EX PARTE

DISPUTE:

Violation of article E6 of the Mackenzie award - minimum days off.

EX PARTE STATEMENT OF ISSUE:

On November 12, 1995 as a result of the late operation of an Amtrack train destined from Chicago to Toronto, the Toronto based crew was delayed several hours arriving Toronto. This extended time period overlapped into one of their 8 calendar days off.

The Corporation refused to allow them a calendar day off in lieu of the one they lost, instead they were offered extra wages which they declined.

The Brotherhood appealed this decision on behalf of the employees involved and the parties have not been successful in resolving this issue. It is the Brotherhood's contention that the minimum 8 calendar days off in 28 be respected.

The Corporation has not responded to the Brotherhood's appeal.

FOR THE BROTHERHOOD:
(SGD.) **J. R. TOFFLEMIRE**
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:
E. J. Houlihan - Senior Manager, Labour Relations, Montreal
J. C. Grenier - retired
And on behalf of the Brotherhood:
J. R. Tofflemire - General Chairman, Oakville
M. Grieve - Local Chairman, Toronto

AWARD OF THE ARBITRATOR

This grievance arises as a result of the initial implementation of provisions of the Mackenzie award, which issued on June 14, 1995. Specifically, the parties are in dispute with respect to the application of the provisions under article E6 of the award providing for a minimum of 8 calendar days off in each four week period.

The facts giving rise to the dispute are not in conflict. On November 12, 1995, a crew operated an Amtrack train from Port Huron to Toronto. Because the train was delayed, their on-duty period overlapped some forty-six minutes into a scheduled calendar day off, November 13, 1995. The employees were paid for the forty-six minutes of service, as well as the paid day off, albeit shortened by the overlap. On their behalf the Brotherhood claims that the employees should be compensated a further full paid day off, or lieu day, in the circumstances. The Corporation responds that in the situation that arose the contemplation of the collective agreement is that employees are to have other protections, including the ability to book rest, and to receive overtime payments if their cumulative hours exceed those contemplated within the collective agreement.

Article E6 of the Mackenzie award provides as follows:

> 6. Locomotive engineers shall be allowed a minimum of eight calendar days off at their home terminal for each designated four-week period. Of the eight calendar days off, they shall be entitled to one calendar day off in each designated week, and 4 calendar days off in each two-week period. In the event that a locomotive engineer is not allowed 4 days off in each designated twoweek period, the Corporation shall pay one hour penalty to that locomotive engineer for each third and fourth day missed, without affecting the obligation of the Corporation to provide 8 calendar days off in the four-week period (the obligation to provide one calendar day off in each week remains mandatory).

There is no dispute on the facts before me that the employees who are the subject of this grievance were scheduled for eight calendar days off within the four-week period. The dispute arises because a particularly onerous assignment was scheduled for arrival at the home terminal relatively late in the day, risking overlap into the scheduled day off. It would appear that since the events giving rise to this grievance the Corporation has changed the method of scheduling, so that such runs are not in fact handled immediately prior to scheduled days off, an **adjustment which** seems to have generally resolved the problem. Nevertheless, for the purposes of the instant grievance the parties are disagreed as to the rights of the employees who were required to work some forty-six minutes into their scheduled day off.

Upon a review of the general provisions of article E of the Mackenzie award, and of the language of article E6, the Arbitrator is left with some difficulty respecting the Brotherhood's position. As the Corporation's representative notes, if the Brotherhood's grievance should succeed, the employees in question would be compensated for their scheduled day off of November 13, shortened by some forty-six minutes, as well as a fully paid lieu day off, effectively resulting in nine calendar days off during the twenty-eight day period (less the forty-six minutes). As the Corporation's representative puts it, the employees would effectively receive double payment, while the Corporation incurs triple cost, being obliged to press a spare crew into service for the ninth calendar day off which the employees would receive.

It does not appear to the Arbitrator, on a general reading of these provisions, that such a result was intended by the Mackenzie award. As a general matter, what the award attempted to achieve for running trade crews in passenger service was a rough equivalent to the two days off in each working week, or eight days off in each twenty-eight day period enjoyed by most employees. However, the only reference to obligations being mandatory is that employees receive a minimum of one calendar day off in each week. The issue then becomes whether in addition to the scheduling of eight calendar days off, subject to the possible payment of overtime when unforeseen circumstances disrupt the schedule, employees are further entitled to lieu time. In the Arbitrator's view when that question is addressed the concerns raised by the Corporation are not insignificant. If, as might occur, a particular crew found itself overlapping into its scheduled day off on some three occasions during a given month, say for a half hour each time, the result might be three further paid lieu days off,

resulting in the practical equivalent of eleven calendar days off, with pay, in the twenty-eight day period. Indeed, the same result might arguably hold if the crew in question overlapped only five minutes into their scheduled day off.

The consequences contemplated by the Brotherhood's interpretation are at substantial variance from the industrial norm, which I believe Mr. Justice Mackenzie was attempting to emulate. Employees who work a regular forty-hour work week, with two consecutive days off, do not generally receive another paid day off if they are compelled to work overtime for one or two hours into a scheduled day off. Rather, the overtime provisions of collective agreements, or of employment standards legislation, are viewed as adequately compensating employees for the additional work, and the forfeiture of the time off. However, in the instant case if the Brotherhood's interpretation should prevail, the Corporation would become the virtual insurer of eight guaranteed days off, with pay, in a twenty-eight day period, in addition to the relatively generous minimum wage guarantees and overtime payments for which it would also be liable. While it might be open to an interest arbitrator to award such unprecedented protections, or indeed for the parties to negotiate them, a rights arbitrator should not conclude that such protections were intended absent clear and unequivocal language in the terms of the collective agreement.

No such terms are to be found in the agreement before me. Article E I brings into play "the principle of the forty hour work week" and article E2 makes provision for a guarantee of 160 hours in each two week period, as well as a formula for the calculation of overtime at time and one-half being paid for hours in excess of the aggregate of the basic 160 hours. However, there is nothing in the language or scheme of the article to suggest the further unprecedented level of protection argued by the Brotherhood in the case at hand. Different considerations might arise, arguably, if it could be shown that the Corporation was in fact manipulating the scheduling process so as to effectively deprive employees of their normal minimum of eight scheduled days off in each twenty-eight day period by consistently scheduling employees in such a fashion as to render them liable to work into their scheduled days off. That is not what transpired in the case at hand, however. Both parties were obviously in the initial stages of trial and error to arrive at an appropriate method of satisfying the newly established set of rights and obligations contemplated by Mr. Justice Mackenzie, and there was no bad faith or arbitrariness in the scheduling options initially utilized by the Corporation.

For all of the foregoing reasons the grievance must be dismissed.

October 19, 1998 **(si2ned) MICHEL G. PICHER**

ARBITRATOR